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No. 566

In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM B. McILVAINE AND JOHN P. WILSON, JR., TRUSTEES UNDER DEED OF TRUST OF JOHN P. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM B. MCILVAINE AND JOHN P. WILSON, JR., Trustees under Deed of Trust of John P. Wilson

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 149) is reported in 29 B. T. A. 304. The opinion of the Circuit Court of Appeals (R. 172) is reported in 78 F. (2d) 787.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1935. (R. 177.) Upon motion of the petitioner, this Court by Mr. Justice

Van Devanter extended the time for filing a petition for certiorari to and including November 1, 1935. (R. 178.) Petition for writ of certiorari was filed November 1, 1935, and was granted November 11, 1935. (R. 179.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A deed creating a single trust for the equal benefit of three beneficiaries was amended to divide the trust estate into three equal parts or shares. A separate account was set up for each beneficiary and an undivided one-third interest in the aggregate trust estate was assigned to each account. Did the amendments create three separate and independent trusts, to which proportionate amounts of the income from the property are separately taxable, or did the original single trust continue as such, to which all the income from the property is taxable?

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 833, 838:

> SEC. 143. FIDUCIARY RETURNS.
>
> (a) *Requirement of return.*—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he

acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

* * * * *

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over;

(5) Every estate or trust the gross income of which for the taxable year is $5,000 or over, regardless of the amount of the net income; * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *.

* * * * *

(b) *Computation and payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

The material provisions of the Revenue Acts of 1924, c. 234, 43 Stat. 253, and 1926, c. 27, 44 Stat.

9, are found in Sections 219 and 225 and are substantially identical with the quoted provisions of the Revenue Act of 1928.

STATEMENT

By deed dated March 19, 1913, John P. Wilson transferred certain stocks and securities to the respondents in trust for the equal benefit of his three children, John P. Wilson, Jr., Martha Wilson, and Anna W. Dickinson. The trustees were authorized to receive all income, to sell the property and reinvest the proceeds as well as undistributed income, but only in accordance with the written directions of two of the beneficiaries. The net income was to be accumulated for fifteen years, unless otherwise directed by the beneficiaries with the approval of the grantor, if living, and after the period of accumulation the net income was to be distributed in equal shares to the beneficiaries so long as they lived. The principal or corpus was to be distributed upon termination of the trust, alternatively, to the three children, their issue, or the issue of the grantor. The trust was terminable at any time by the three beneficiaries, with approval of the grantor, if living, and was to be terminated in any event upon the death of the survivor of the three beneficiaries. It was provided that the trust instrument might be altered, changed, or modified in any respect and to any extent by the three beneficiaries, with approval of the grantor, if living. (R. 19–25.)

Three amendments dated, respectively, June 19, 1919, December 1, 1920, and December 6, 1920, were made to the trust instrument by the beneficiaries, with approval of the grantor. The first provided that the trust estate be divided into three separate and equal parts or shares, one for each beneficiary, to which undivided interests in the whole or any part of the estate might be assigned, all additions to the estate to be divided among the separate trust estates in equal shares; that the net income from each trust be paid to the beneficia , entitled thereto when a majority of the beneficiaries so requested in writing, with provision for distribution of the share of any deceased beneficiary; and that the principal be distributed upon termination of the trusts substantially as provided in the original deed. (R. 26–29.) The second amendment provided for distribution of income upon request of a majority of the beneficiaries, with the proviso that equal amounts must be distributed to each. (R. 29–33.) The third amendment extended the authority of the trustees to the sale, leasing, and improvement of any real estate held in trust, but no change in investments could be made without the direction or approval of two of the beneficiaries, and further provided that the trust funds and estate should be kept divided into three equal parts, each to be held and administered as a separate trust for the beneficiaries respectively. Provisions for distribution of income and principal were made substantially as provided for formerly. (R. 33–39.)

Prior to the amendment of June 19, 1919, the trustees kept their accounts as a single trust for three beneficiaries and after that date the capital account was divided into three equal parts and one assigned to each original beneficiary, for whom a separate account was kept from that date. (R. 154–155.) The trust property in June, 1919, consisted of stocks, real estate, and cash. There was not at any time an actual division of the trust assets or property among the beneficiaries, but separate accounts were maintained and an undivided one-third interest in each item of property, regardless of when acquired, was assigned to the account of each beneficiary. No particular certificates of stock, no particular parcels of real estate, and no segregated amount of cash were distributed to the respective accounts of the three original beneficiaries. Each beneficiary was assigned an undivided interest in each item of trust property. Income received from the trust property was divided and carried in equal amounts to the beneficiaries' accounts. The stocks and securities were held in the names of the trustees as such under the original deed, or in the name of their nominee. The real estate was held in the names of the trustees, originally as joint tenants and later as trustees, and after the amendments to the deed of trust no new declarations were made that the real estate was held for three separate trust estates. Other than the establishment of three separate accounts on the books to which equal undi-

vided interests were assigned after the June, 1919, amendment, the trustees treated the estate or property as held in one trust. The trustees at all times kept only one bank account, into which all receipts of cash went and from which all disbursements of cash were made. (R. 154–155.)

The amendments to the trust deed were made for the purpose of identifying the interests of the respective beneficiaries in the event of the death of any beneficiary, and also for the purpose of reducing the taxes on undistributed income from trust property to be accumulated by having the same taxed as income of three separate trust estates or entities rather than as income of one trust or entity. (R. 93–94.)

For the years 1924 to 1928, inclusive, the trustees filed separate fiduciary and income-tax returns for each beneficiary, on the theory of there being three separate trust estates. The gross income, deductions, and tax liability of each beneficiary for each year as shown on the returns were the same in amount. The Commissioner, upon audit of the returns, determined that there was but one trust estate held for three beneficiaries and that the income from all the property is taxable as a unit to the one trust. (R. 155.)

The single issue submitted to the Board of Tax Appeals was whether the income derived from the trust property during the taxable years and not distributed or distributable to the beneficiaries is tax-

able on the basis of a single trust or of three separate trusts. (R. 78.) The Board of Tax Appeals sustained the taxpayers, holding that the income should be taxed on the basis of three separate trusts and returns and accordingly found no deficiency in tax. (R. 159.) The Circuit Court of Appeals affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the deed of trust as amended created three separate trust estates and entities and that the undistributed and undistributable income from the trust property is taxable to each trust estate according to the amount assigned thereto.

2. In not holding that under the deed of trust as amended there was a single trust estate to which all the undistributed and undistributable income from all trust property is taxable.

3. In deciding that there is no deficiency in tax for each of the taxable years.

4. In refusing to decide that there is a deficiency in tax for each year in the respective amounts stipulated by the parties.

ARGUMENT

This case presents the identical question involved in *United States Trust Company of New York, Trustee Under Deed of Trust of John P. Wilson* v. *Helvering, Commissioner,* now pending in this Court, No. 169, October Term, 1935, on certiorari

to the Circuit Court of Appeals for the Second Circuit. That case involves the construction of certain amendments, similar to those here involved, to another deed of trust by the same grantor and for the same beneficiaries as here involved. In the *United States Trust Company* case, as here, there was created by the original deed of trust a single trust estate for the equal benefit of the grantor's three children who were authorized to amend, alter, modify or change the deed in any way, subject only to the approval of the grantor, if living. Amendments were made, as authorized, which in all material respects were substantially like and to the same effect as the amendments made in the instant case. The Circuit Court of Appeals for the Second Circuit held that there was but one trust and taxable entity after as well as before the amendments.

The question here presented is now before the Court in the *United States Trust Company* case, which on its facts does not differ materially from the instant case. Although the provisions for division of the trust estate into three "separate and equal parts or shares" are the same in the first amendments to each of the deeds of trust, here the first amendment, as well as the second and third amendments, speaks of "separate trust estates" (R. 27). On the other hand, the first amendment to the deed of trust in this case makes provision for the division of income in equal shares or parts, "except and unless it shall be otherwise directed

in the instrument of gift making an addition to the *trust estate* held under said indenture." (Italics supplied, R. 27.) It is believed that neither variation, each pointing to a contrary conclusion, makes any substantial difference in the determination of whether the original trust estate continued or has been divided into three separate trust estates. The petitioner, therefore, in the interest of brevity, adopts and incorporates herein by reference the argument presented in the brief filed on behalf of the respondent in *United States Trust Co. of New York, Trustee Under Deed of Trust of John P. Wilson* v. *Helvering, Commissioner, supra.*

CONCLUSION

We respectfully submit that the decision of the court below was erroneous and should be reversed.

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